PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D2-28-357 OF 1993
ARIFIN JAKA J
17 OCTOBER 1998

Companies and Corporations — *Winding up — Inability to pay debt — Disputed debt — No bona fide dispute as to debt — Whether just and equitable that company be wound up*

Companies and Corporations — *Inability to pay debt — Notice of demand — Validity of notice — Whether debt due and payable — Whether claim for sum in foreign currency is an unliquidated sum — Companies Act 1965 s 218(2)(a)*

On 15 October 1993, the petitioner presented a winding-up petition against the respondent on the ground that the respondent was unable to pay its debt and that in the circumstances it was just and equitable for the respondent to be wound up. The petitioner also sought an order appointing the Official Receivers as provisional liquidators and for the costs to be paid out of the assets of the company. In opposing the winding-up application, the respondent sought to argue that: (i) the statutory notice of demand dated 24 August 1993 issued pursuant to s 218(2)(a) of the Companies Act 1965 ('the Act') was invalid; and (ii) the petition was defective as it did not state the amount owing to the petitioner. In relation to the first issue, the respondent, whilst conceding that the statutory notice was properly issued and served, argued that as the amount demanded was in US dollars, the sum was for unliquidated damages which was incapable of forming the basis for a statutory notice under the Act and furthermore, that the amount claimed was not then due and outstanding. The company also argued that by virtue of a civil suit ('the suit') filed by the respondent against the petitioner on 18 January 1994 for loss of profits and damages for breach of contract, there was a genuine and bona fide dispute as to the debt claimed and that winding up ought not to be ordered.

Held, allowing the winding-up application:

(1) The petitioner and the respondent had agreed that payment would be in US dollars as evidenced by the invoices and when payment was made, it was in US dollars at the conversion rate when payment was due. The respondent was not prejudiced or misled in any way and knew the amount payable to the petitioner which was a liquidated sum though expressed in US dollars (see p 275A–B); *Miliangos v George Frank (Textile) Ltd* [1975] 3 All ER 801 and *Re Pen-Y-Van Colliery Co* (1887) 6 Ch D 477 distinguished. It was clear from the statement of account that as of 30 June 1993, the respondent had exceeded the

90-day credit limit by US$406,530. The statutory notice was issued on 19 August 1993 and as the credit limit had been exceeded it could not be said that the debt was not then due and the statutory notice was therefore valid (see p 275F, I); *Re Bryant Investment Co* [1974] 1 WLR 826 distinguished; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 and *Sri Hartamas Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 followed.

(2) As the respondent was fully aware of the amount claimed by the petitioner, no injustice had been done arising from the failure to state the amount owing by the respondent in the petition. The failure to do so was a formal defect which was curable under r 194(1) of the Companies (Winding-up) Rules 1972 and was not embarrassing as to warrant a striking out (see p 276B–E).

(3) The suit filed by the respondent was not supported by evidence to sustain the contention that the debt claimed by the petitioner was bona fide disputed. The suit was mala fide and filed for the purpose of delaying the winding up of the respondent (see p 277C–D).

[Bahasa Malaysia summary

Pada 15 Oktober 1993, pempetisyen menyerahkan petisyen pengulungan terhadap responden atas alasan responden tidak mampu membayar hutang dan dalam keadaan ini pengulungan adalah adil dan saksama terhadap responden. Pempetisyen juga menuntut supaya Pegawai Penerima dilantik sebagai penyelesai sementara dan kos dibayar daripada harta syarikat tersebut. Dalam menentang permohonan pengulungan, responden berhujah bahawa: (i) notis tuntutan statutori bertarikh 24 Ogos 1993 yang diserahkan mengikut s 218(2)(a) Akta Syarikat 1965 ('Akta tersebut') adalah tidak sah: dan (ii) petisyen tersebut adalah cacat kerana tidak menyebut jumlah yang terhutang kepada pempetisyen. Berkaitan dengan isu pertama, responden, yang mengaku bahawa notis statutori telah dikeluarkan dan diserahkan dengan sempurna, berhujah bahawa oleh kerana jumlah tuntutan adalah dalam dolar Amerika, jumlah tersebut adalah sebagai ganti rugi tidak tertentu yang tidak berupaya menjadi asas kepada notis statutori di bawah Akta tersebut dan selanjutnya, jumlah yang dituntut belum cukup tempoh dan terhutang. Syarikat tersebut juga berhujah bahawa berdasarkan guaman sivil oleh responden ('guaman tersebut') terhadap pempetisyen pada 18 Januari 1994 untuk kehilangan keuntungan dan ganti rugi untuk pecah kontrak, terdapat pertikaian bona fide yang sebenar ke atas hutang yang dituntut dan pengulungan tidak sepatutnya diperintahkan.

Diputuskan, membenarkan permohonan pengulungan tersebut:

(1) Pempetisyen dan responden telah bersetuju bahawa bayaran hendaklah dalam dolar Amerika sebagaimana yang dibukti daripada invois-invois dan apabila bayaran dibuat, ia seharusnya

dibuat dalam dolar Amerika mengikut kadar pertukaran semasa. Responden tidak dimudaratkan atau diputarbelit dalam apa cara sekalipun dan mengetahui jumlah untuk dibayar kepada pempetisyen yang merupakan jumlah tak tertentu walaupun dinyatakan dalam dolar Amerika (lihat p 275A–B); *Miliangos v George Frank (Textile) Ltd* [1975] 3 All ER 801 dan *Re Pen-Y-Van Colliery Co* (1887) 6 Ch D 477 dibeza. Adalah jelas daripada penyata akaun bahawa setakat 30 Jun 1993, responden telah melebihi 90 hari had kredit sebanyak US$406,530. Notis statutori telah dikeluarkan pada 19 Ogos 1993 dan apabila telah melebihi had kredit tersebut, ia tidak boleh dinyatakan sebagai hutang belum cukup tempoh dan oleh itu notis statutori tersebut adalah sah (lihat ms 275F, I); *Re Bryant Investment Co* [1974] 1 WLR 826 dibeza; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 dan *Sri Hartamas Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 diikut.

(2) Oleh kerana responden menyedari sepenuhnya jumlah tuntutan oleh pempetisyen, ketidakadilan tidak wujud atas sebab kegagalan untuk menyatakan jumlah yang terhutang oleh responden dalam petisyennya. Kegagalan berbuat demikian adalah kecacatan formal yang boleh diperbetulkan di bawah k 194(1) Kaedah-Kaedah (Pengulungan) Syarikat 1972 dan tidak memudaratkan sehingga mewajarkan ia dibatalkan (lihat p 276B–E).

(3) Guaman tersebut oleh responden tidak disokong dengan bukti untuk menyokong penghujahan bahawa hutang yang dituntut oleh pempetisyen adalah pertikaian bona fide. Guaman tersebut adalah mala fide dan difailkan untuk melengahkan pengulungan responden (lihat p 277C–D)].

Notes

For cases on inability to pay debts, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 676–718.

Cases referred to

Bryant Investment Co, Re [1974] 1 WLR 826 (distd)
Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801 (refd)
Pen-Y-Van Colliery Co, Re (1877) 6 Ch D 477 (refd)
Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (folld)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (folld)
WR Willcocks & Co Ltd, Re [1973] 2 All ER 93 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)
Companies Act 1948 s 223(a) [UK]
Companies (Winding-up) Rules 1972 rr 22, 194(1), Form 2, Form 3

Matthias Chang (*Suhaimi Khor Zulkifli & Chang*) for the petitioner.
Ahmad Moosdeen (*Chee Beng Hwa* with him) (*Chee Fabli & Adrian Han*) for the respondent.

Arifin Jaka J: This is a petition presented on 15 October 1993 by PT Anekapangan Dwitama, a company incorporated in Indonesia having its registered office at Jln Mangga Dua Raya Blok E 1/2 Jakarta Utara, Indonesia ('the petitioner') for the winding up by the court under the provisions of the Companies Act 1965 ('the Act') of Far East Industries Sdn Bhd ('the company') on the ground that the company was unable to pay its debts and that in the circumstances it is just and equitable that the company be wound up. The petitioner also seeks an order that the Official Receiver may be appointed as the provisional liquidator and that the costs of this petition be paid out of the assets of the company.

One of the objects for which the company was established is to carry on the business of manufacturers of all kinds of instant noodles, rice noodles, vermicelli and other edible products; and to carry on the business of canners, dealers, importers and exporters of preserved and canned foods of all descriptions; malted food and milk products, tropical fruit preserves, jams marmalade, jellies, juices and syrups, confectionery, biscuits, toffees, chocolate and such like boiled sweets, margarines, vegetable fats, butter, tea, coffee, cocoa and such like beverages, vinegars, sauces, food seasonings and such like table condiments.

The company has an issued and paid-up capital of 1,005,006 ordinary shares of RM1 each made up of RM335,002 in cash and 670,004 otherwise than cash.

The company produces instant noodles under the trade name of 'Indomie'. An essential ingredient in the manufacture of Indomie is a seasoning material. The petitioner was the sole supplier of the seasoning material to the company. The petitioner claims a sum of US$705,714 being the amount outstanding which was due and owing to the petitioner. On 19 August 1993, through its solicitors M/s Suhaimi Khor Zulkifli & Chang the petitioner issued a notice of demand in pursuance of s 218(2)(a) of the Act ('the statutory notice') demanding payment from the company of the sum of US$705,714 within 21 days from the date thereof.

The petition was filed on 15 October 1993. In the petition, it is alleged that the company was served with the statutory notice on 24 August 1993. The company has for three weeks after the service of the statutory notice failed or neglected to pay or satisfy the said sum or any part thereof or secure or compound for it to the reasonable satisfaction of the petitioner. It is also alleged that the company is therefore unable to pay its debts and in the circumstances, it is just and equitable that the company should be wound up.

The petition came up for hearing on 19 October 1995 after I had dismissed the company's application to strike out the petition by way of a notice of motion (encl 12) earlier on the same day. Learned counsel then appearing on behalf of the company, Mr RR Sethu requested an adjournment for a month to advise his client to settle the debt. The petition

was adjourned to 19 December 1995 for hearing. It was again adjourned pending the disposal of an application (encl 172) by PT Jakarama Tama, a creditor of the company for a declaration that the petitioner had ceased to exist as a corporate entity since 1 March 1994 and an order that PT Jakarama Tama be substituted in place of the petitioner to prosecute the petition. The application was dismissed. An appeal against the dismissal to the Court of Appeal was also dismissed. The petition was finally fixed for hearing on 22 July 1997. At the hearing, En Ahmad Moosdeen and En Chee Beng Hwa appeared for the company whilst En Matthias Chang represented the petitioner. Learned counsel for the company raised the issues: (a) whether the statutory notice of demand under s 218(2)(a) of the Act is invalid; and (b) whether the petition is defective in that it does not state the amount due and owing by the company to the petitioner.

Section 218 notice

Section 218(2)(a) of the Act requires that a demand has to be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. It is also a requirement that the demand must be served at the registered office of the company. It must also state that the company is required to pay within three weeks thereafter or to secure or compound for it from the date of the service of the notice. The statutory notice need not be in a special form but it must comply strictly with the requirement of s 218(2)(a) of the Act (see *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108). Section 218(2)(a) should be given a literal interpretation (see *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178).

It is not in dispute that the statutory notice was properly issued and was properly served on the company. Learned counsel for the company, however, contended that the notice of demand is invalid on the grounds that the amount claimed as stated therein is in foreign currency which in fact is a claim for unliquidated damages and that it was then not due. As regards the first ground, En Ahmad Moosdeen submitted that the claim being in US dollars is a claim for unliquidated damages and it cannot therefore form the basis for a notice under s 218 of the Act. He relied on the case of *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL) in support of his contention. In that case, it was decided by the House of Lords (by a majority) that in an action for a sum of money due under a contract the plaintiff would be entitled to judgment in the currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was that of the same country. The plaintiff's claim which was in Swiss francs was allowed as the law of the contract was Swiss law and the money of account and payment was Swiss francs. The judgment amount would have to be converted into sterling when the judgment is enforced. With respect to learned counsel, I am of the view that *Miliangos*' case is not an authority for saying that a claim in foreign currency is a claim for unliquidated damages and cannot be the basis for a statutory notice under s 218 of the Act. It is authority to show that the court has the jurisdiction to give judgment in foreign currency under certain circumstances as stated in that case.

In the instant case before me, the petitioner is claiming payment in US dollars. The petitioner and the company had agreed that payment would be in that currency as evidenced by the invoices. In fact, payment was made by the company in US dollars at the conversion rate at the time when payment was due. The company is not prejudiced or misled in any way. He knew what was the amount due from and payable by him to the petitioner and more so when the amount is for a liquidated sum though in US dollars.

Learned counsel for the company also referred to *Re Pen-Y-Van Colliery Co* (1877) 6 Ch D 477. In that case, the claim was for an unliquidated damages for an alleged fraudulent representation. The court held that the petitioner is not a creditor until the damages is ascertained by a judgment. It was clear the claim was an unliquidated claim. In the instant case, the petitioner's claim is for a liquidated sum and the amount claimed is admitted by the petitioner in its statement of account (exh AP1 in encl 18). It is not a claim for unliquidated damages. On the facts, *Pan-Y-Van*'s case does not apply.

The other reason advanced by the company in its contention that the notice is invalid is that the amount stated therein was not then due though outstanding. He relied on the case of *Re Bryant Investment Co* [1974] 1 WLR 826, where Plowman J held that the words 'is indebted' and 'then due' followed by a reference to payment of the sum 'so due' in s 223(a) of the Act [English Companies Act 1948] were not appropriate to a debt which is not yet due; that on the evidence, there was a dispute whether the debt claimed was presently due and that accordingly, a winding-up order should not be made.

Similar words are used in s 218(1)(a) of our Act. The question is whether the debt in the instant case was then due when the notice of demand was issued. It is clear from the statement of account (exh YJB 17 in encl 25) that as at 30 June 1993 the company had exceeded the 90-day limit by RM406,530. The statutory notice was issued on 19 August 1993 and at that time the credit limit had been exceeded and it cannot be right for the company to say that the debt was not then due. The case of *Re Bryant* is distinguishable where in that case there was a dispute as to whether the debt claimed was then due. In the present case, there is no evidence to support the allegation that the debt was not due. On the other hand, there is ample evidence to show that the debt was not only due but was admitted as I had stated earlier in this judgment. It follows therefore that the contention of the company that the debt was not then due is devoid of merit.

On the evidence and for the reasons above stated, I rule that the notice of demand was in compliance with s 218(2)(a) of the Act on a literal interpretation as enunciated in *Re Perusahaan Jenwatt Sdn Bhd* and approved by the (then) Supreme Court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313. The notice of demand is therefore valid.

Whether the petition is defective

Encik Ahmad Moosdeen for the company submitted that the petition does not state the amount due and owing by the respondent. The amount claimed is therefore not pleaded in the petition.

Under r 22 of the Companies (Winding-up) Rules 1972 ('the Rules'), it is provided that every petition for winding up of a company by the court may be in Form 2 or 3 with such variations as circumstances may require. The petition filed herein is in accordance with Form 2. In para 6 of the petition, it is stated that a notice of demand was served on the company and that the company had neglected to pay the sum demanded therein within the stipulated time period. The company knew the amount that it had to pay to the petitioner as the notice of demand which is annexed to the petition states the amount. The petition is not embarrassing as to warrant a striking out. (See *Re WR Willcocks & Co Ltd* [1973] 2 All ER 93.)

To my mind, the failure of the petitioner to state the amount in the petition is a formal defect. This is curable under r 194(1) of the Rules which provides:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

Under the circumstances of this case, I find no injustice has been done to the company. As stated earlier, the company was fully aware of the amount claimed by the petitioner since the amount was clearly stated in the statutory notice. I therefore rule the petition is properly presented before this court. The issue raised by learned counsel that the petition is defective is therefore devoid of merit.

Petitioner's contention

The last point I have to consider is whether the company is solvent. It is contended by the petitioner that the company is insolvent.

In the affidavit of Yeoh Jin Beng, a director of the company affirmed on 25 April 1994 (encl 21) in para 7(c), he admitted that the company has been insolvent for many years due to the nature in which its operation has been funded through shareholder's advances. It is clear from the audited accounts of the company as at 31 December 1992 that the accumulated losses amount to RM3,557,011. Bearing in mind these losses, can the company claim that it is able to pay its debts?

The presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied. It is for the company to prove that it is able to pay its debts. If the company does not have assets available to meet the current liabilities, it is commercially insolvent and may be wound up (see *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd*). I find the company has not adduced evidence to justify the findings that the company is solvent and is able to pay its debts.

A It is axiomatic that a winding-up order should not be made if the debt is bona fide disputed. On this issue too, I find the company has not adduced evidence to show that there is a genuine dispute of the debt claimed. The company in attempting to demonstrate there is a bona fide dispute contended that it has filed a claim against the petitioner vide High Court Kuala Lumpur Civil Suit D2–22–57–94 filed on 18 January 1994. The B claim is for loss of profit and damages for breach of contract on the part of the petitioner in terminating the contract to supply the seasoning material to the company. On scrutinizing the affidavits filed on behalf of the company, I fail to find any evidence to show that there was any arrangement between the petitioner and the company that the petitioner were to continue C supplying the company even though when the company had failed to make payments when such payments were due. Surely the petitioner had the right to stop supplying the company with the goods under such circumstances.

The claim was filed about five months after the service of the statutory notice and three months after the filing of the petition. I find that the claim filed by the company is mala fide, which is not supported by evidence to D sustain the contention that the debt claimed by the petitioner is bona fide disputed. I am of the view the claim was filed for the purpose of delaying the winding up of the company.

In the result, I order the company be wound up; that Mr Peter Khoo of Messrs Khoo & Co and Mr Ng Pyak Yeow of Messrs Ng Lee & Partners be E appointed as liquidators of the company. The costs of the petition be taxed and paid out of the assets of the company.

Order accordingly.

Reported by Lew Chee Seong

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